IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTON

COMPANY APPLICATION NO. 3 OF 2005

. In the matter of the Companies Act, 1956;

AND

. In the matter of Sections 79, 80 an 100 to 103 of the Companies Act, 1956;

Rallis India Limited ..... Applicant

Mr. Janak Dwarkadas with Jal Andhyarujina i/b. A.Z.B. and Partners for applicant.

CORAM: S.U. KAMDAR, J.

DATE : 10TH FEBRUARY, 2005.

JUDGEMENT :

1. The present application is placed before me for directions inter-alia seeking direction that the provisions of section 101 (2) and procedure set out therein should not apply to the reduction of the capital due to adjustement of share premium account

and Capital Redemption Reserve Account of the applicant with the accumalated losses of the company. The applicant company has passed a special resolution in terms aforestated on 20.12.2004 and in terms of section 100 and section 101 of the Act seeks confirmation thereof from this Court.

2. This application raises a very interesting question of law as to the interpretation of the provisions of sub-section (2) of section 101 of the Companies Act-I of 1956.

3. Some of the few facts which are necessary for determination of the aforesaid question of law. I ave briefly enumerated as under :

4. Rallis India Limited was incorporated on 13.8.1998 under the provisions of the Indian Companies Act, 1930 as a public limited company limited by shares. The authorised share capital of the company is Rs.200,00,00,000/- (Rupees Two Hundred crores) divided into 5,00,00,0000 Equity shares of Rs.10/- each and 15,00,00,000 Preference shares of

Rs.10/- each. The paid up share capital of the company is Rs.99,98 45,930/- representing 1,19,84,593 Equity shares of Rs.10/- each and 8,80,00,000 Preference shares of Rs.10/- each. Sometime in or about 2003-2004 four wholly owned subsidiaries of the applicant company were merged with the applicant, thus, due to the said merger losses of all these four companies were included in the Books of Account of the applicant compaby and therefore substantial loss was indicated in the financial year 2002-03 in the accounts of the company. It was then decided by the company that the share premium account and the Capital Redemption Reserve of the Company should be reduced to adjust the debit balance in the Profit and Loss Account. Thus in the aforesaid manner it was decided that a debit balance of Rs.75.58 crores in t he Profit and Loss Account of the Company as on 31.3.2004 should be wiped off. The said adjustment of outstanding in the Capital Redemption Reserve account and Share Premium Account reduces the share capital which has already been lost, or is unrepresented by available assets. The Company is thus proposing to utilize and apply the balance in

respect of the said accounts for the adjustment and writing off of the debit balances under the Profit and Loss Account of the Company.

5. On 28.10.2004, the board of directors of the applicant company held a meeting and approved the said proposal of the reduction of share capital by the aforesaid adjustment and an extraordinary general meeting was convened on 20.12.2004 for passing a necessary resolution as required under the provisions of the Companies Act. According to the company under the provisions of the sections 78 and 80 read with section 100 of the Said Act of 1956 it is permissible to adjust the share premium account and the Capital Redemption Reserve Account for the purpose of writing off of the debit balances in the Profit and Loss Account of the Company. In view of the sub-section 2 of Section 78 of the Act the reduction in the Share Premium Account would amount to reduction in the share capital of the company and thus the procedure prescribed for the purpose of reduction in the share capital from Section 100 to Section 105 of the Act is

required to be complied with. According to the Company the company is empowered under the provisions of Articles of Association to carry out such an exercise. In the meeting of the shareholders held on 20.12.2004 being an extraordinary general meeting of the company the shareholders of the company accorded their consent to the reduction of the Share Premium Account and the Capital Redemption Reserve Account and the necessary resolution as contemplated under the provisions of the Act was passed.

6. It is thus in the aforesaid facts of the case that the learned advocate for the applicant submitted that the reduction of the Share Premium Account and the Capital Redemption Reserve Account does not involve a diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid up share capital of the Company and thus the company has pleaded that the procedure prescribed under sub-section (2) of Section 101 of the a Act should be dispensed with.

7. In the light of the aforesaid facts a question

of law has been raised whether the Court has power to dispense with procedural requirements as contemplated under the provisions of sub-section (2) of section 101, the procedural requirements as contemplated therein and if there is any such power then what should be the guidelines of criteria which the court should take into consideration for dispensing with such a requirement. Before I go into large number of authorities which have been cited before me it is necessary that the provisions of section 100 and 101 of the said Act are reproduced which are as under :

> "100. Special resolution for reduction of share capital. (1) Subject to confirmation by the [Tribunal] a company limited by shares or a company limited by guarantee and having a share capital, may if so authorised by its articles, by special resolution, reduce its share capital in any way; and in particular and without prejudice to the generality of the foregoing power, may-
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> (a) extinguish or reduce the liability on any of its shares in respect of share capital not paid-up;
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> (b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost, or is unrepresented by available assets; or
>
> (c) either with or without extinguishing or reducing liability on

any of its shares, pay of any paid-up share capital which is in excess of the wants of the company.;

. any may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act referred to as " a resolution for reducing the share capital".

.101 Application to the Tribunal for confirming order, objections by creditors and settlement of list of objecting creditors

. (1). Where a company has [passed as resolution for reducing share capital it may apply, by petition, to the [Tribunal] for an order confirming the reduction..

. (2). Where the proposed reduction of share capital involves either the diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the [Tribunal] so directs, the following provisions shall have effect, subject to the provisions of sub-section (3):-

(a) every creditor of the company who at the date fixed by the [Tribunal] is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction;

(b) the [Tribunal] shall settle a lilt of creditors so entitled to object, and for that purpose shall ascertain , as far as possible without requiring an application from any

creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

(c) where a creditor entered on the list whose debt or claim is not discharges or has not determined does not consent to the reduction, the [Tribunal] may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the [Tribunal] may direct, the following amount:-

(i) if the company admits the full amount of the debt or claim or though not admitting it, is willing to provide for it, then the full amount of the debt or claim;

(ii) if the company does not admit and is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then, an amount fixed by the [Tribunal] after the like inquiry and adjudication as if the company were being wound-up by the [Tribunal].

(3) Where a proposed reduction of share capital involves either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the [Tribunal] may, if, having regard to any special circumstances of the case, it thinks proper so to do, direct

that the provisions of sub-section (2) shall not apply as regards any class or classes of creditors.

8. The first question which arises for my determination is that whether on the true scope and interpretation of the section 100 and 101 of the Act whether the procedure contemplated therein is required to be complied with in cases where the proposal put forward for reduction of share capital does not involve, 1) the diminution of liability in respect of unpaid share capital or 2) the payment to any shareholder of any paid-up share capital or by virtue of the words "any other cases" appearing under sub-section (2) of Section 101 the procedural requirements set out therein should be complied with in all cases where share capital is proposed to be reduced.

9. Mr. Dwarkadas learned counsel appearing for the applicant company has contended before me that by virtue of the provisions of section 100 after the resolution is passed by the company for reducing the share capital it is required to be put forward to the

court for confirmation thereof and while confirming the said resolution under section 101 the court has to take into account the interest of the creditors by virtue of the provisions of sub-section (2) of thereof. Thus according to him the provisions shall apply only in cases where the interest of the creditors is affected. He has contended that in the first two categories namely where the reduction of share capital involves the diminution of the liability in respect of the unpaid share-capital or 2) the payment to any shareholder of any paid up share capital, and thirdly if the court so directs where the interest of the creditors is likely to be affected by virtue of such reduction of share capital. He has thus contended that in the third category there is no need to comply with the provisions of sub-section 2 of section 101 because according to him, in the third category the provisions of the section would apply only if the court so directs. The learned counsel has thus made a distinction between the first two categories where the requirement of compliance with the provisions of sub-section 2 of section 101 is mandatory and the

third category where there is no need to comply with such procedure unless there is specific direction from the court in that behalf. The learned counsel has thereafter further submitted that even in cases where there is diminution of liability in respect of unpaid share capital and the payment to any shareholder of paid up share capital where the procedure is required to be complied with under sub-section (2) of section 101 still in those cases by virtue of the provisions of sub-section (3) of section 101 the court has been given power to dispense with the procedural requirements of sub-section (2) in special circumstances. Thus according to the learned counsel for the applicant the power of the court to dispense with the requirements of sub-section 2 of section 101 only applies in cases of first two categories whereas in the third category there has to be specific direction from the court to comply with the provisions of sub-section 2 of section 101 and in absence of of such direction the company is not bound to comply with the provisions of sub-section 2 of section 101 and entitled to confirmation of reduction in the

share capital without complying with the procedure therein.

10. Thus according to the learned counsel for the the applicant in the present case since the reduction in the share capital is neither for the diminution of liability nor payment to any shareholder of the paid up share capital the provisions of sub-section 2 are not required to be complied with. In so far as third category is concerned empowering the court to given specific direction in the cases falling under the words " any other case" the learned counsel has submitted that such a power of the court must be exercised and can only be exercised in cases where reduction of share-capital is not in either of the two modes provided in the first part of sub-section (2) but still likely to affect the interest of the creditors then in that event alone the court has discreation to specifically direct a particular company to comply with the procedure of sub-section (2). It has been further submitted by the learned counsel for the applicant that the whole purpose and intent of enactment of sub-section (2) of section 101

is to protect the interest of the creditors. Thus while construing the third part of sub-section (2) of section 101 it is necessary that the court must keep in mind the intention of the legislature in enacting the said section and therefore reduction in share capital must be correlated with the likely effect on the interest of the creditors and not otherwise.

11. Before I consider various authorities in my opinion in so far as the provisions of sub-section (2) of section 101 is concerned the same requires an interpretation for more than one reasons. On the plain reading of sub-section (2) of section 101 the legislature has carved out three eventualities.

i) diminution of liability in respect of unpaid share capital, or

ii) payment to shareholder of any paid-up share capital and

iii) and in any other case if the court so directs.

12. In so far as the first two categories are concerned, I do no find any difficulty because they are specific in nature and if reduction of share capital has an effect of either of the first two eventualities prescribed therein then obviously the provisions of sub-section 2 is totally mandatory and is required to be complied with. Undoubtedly there is power in the company court to dispense with even such mandatory requirement by virtue of sub-section (3) of section 101 but in my opinion such power can be rarely exercised and the language of sub-section (3) makes the said fact clear. Sub-section (3) provides with the dispensing of the requirements falling in the first two categories only in special circumstances and that court can exercise such power under sub-section (3) only after recording special reasons for exercising such a power. Thus the power dispensing with the provisions of sub-section (2) of section 101 in so far as it relates to the first two categories the court must apply its mind and ascertain what are the special circumstances which calls for exercise of power of dispensing under

sub-section (3) of section 101 of the Act.

13. In so far as sub-section (2) of section 101 is concerned, i.e. "any other cases" where the court so directs the procedure of sub-section 2 of section 101 should be complied with in my opinion in such cases there is no provision of dispensing with the procedure prescribed under sub-section 2 of section 101. It is because the language of the section is clear that such requirement is required to be complied with only if there is such a direction from the court to do so. This leads me to next facet of interpretation of sub-section (2) of section 101. It is more complex i.e. what are the cases where a direction can be given to the company to comply the provisions of sub-section (2) of section 101 even though the same does not result in diminution of the liability and or repayment of the share capital. For the aforesaid purpose it is necessary to interpret the word "any other case" as appearing in sub-section (2) of section 101. The learned counsel for the applicant Mr. Dwarkadas has relied upon the various authorities which I shall now revert to breiftly for

the purpose of interpreatation of sub-section (2) of section 101. Firstly the learned counsel for the applicant has relied upon the judgment of this court in the case of **In re The Tata Iron and Steel Co. Ltd Bombay Law Reported page (1926) 30 Bom.L.R. 197** particularly the following paragraph appearing on page 207 on the judgment.

> ". I now come to the second of the general objections. it is urged tht the company must take proceedings to alter the memorandum and the articles before the Court can sanction a scheme involving such alteration. The Act is capable of a construction which may seem to favour this argument, but there is authority so clear upon the point that it is unnecessary to discuss at length. It is enough to point out that s.153 does not contain any express requirement of this nature, and it would be most inconvenient were its terms cut down by s.10. But to come to the authorities. The case of *Inre Palace Hotel, Limited* is one where a scheme was put forward which involved an alteration of the memorandum of association (vide p.443). the question considered was whether the scheme fell within s.45 the conditions of which has not been complied with. (The references are to the English statue) That section is identical with s.54 of the Indian Act. It was held that as s.45 was inapplicable the scheme could be sanctioned under s.120. the question whether this could have been done had s.45 been applicable was left open. The next case upon the point is *Inre Schweppes Limited* Though the scheme did not in fact involve an alteration of the memorandum the Court held

that even if an alteration of had been involved the scheme could have been sanctioned under s.120 so long as it was outside s.45. the last case is *In re J.A. Nordbery Limited* Neville J. followed the previous decisions. He says (p.441):-

. "As I understand the authoritis you can under s.120 alter the rights conferred by the memorandum upon preference shareholders, provided that in so doing you avoid consolidating shares of different classes or dividing shares into shares of different classes."

. He regarded s.45 (p.441) "not an enabling section as its form would suggest, but a section limiting the generality of the power under s.120 to make arrangements with regard to capital which alter the terms of the memorandum of association."

. The general results appears to be this that where the Act lays down an express procedure for altering the memorandum it is doubtful whether it is not necessary to follow that procedure, before applying for sanction under s.120, but where that is not so the court can under s.120, but where that is not to the Court can under s.120 sanction a scheme which alters the memorandum. I have considered the other cases cited, but those discussed are the most recent authorities upon the point. I follow these cases. This objection, therefore fails."

14. Thereafter the learned counsel has relied upon the judgment of this court in the case of **In re The Katni Cement and Industrial Co. Ltd reported in (1936) 39 Bom.L.R. page 677,** particularly the following paragraph :

> ". On a careful consideration of the cases referred by Buckley as authorities for the statement of the law an practice in the above passage, and others cited at the bar, it seems to be well established in England that *(see Palace Hotel, Limited) In re Scheweppes Limited, In re and J.A. Nordberg Limited, In re)* the court can under this section sanction a scheme, even though it involves acts which, apart from such provisions, would be ultra vires the company; but this rule is subject to the limitation that if the /Companies Act contains express provisions enabling the doing of any act in a particular way, the provisions of the enabling section, and not those of s.153, must be followed. The decision in the three cases to which I have referred ahove would seem to show that s. 153 as altered by the Act of 1929 would, read with s.154, give a very wide power to a company in this respect and a scheme involving a re-organization of capital which altered rights conferred by the memorandum of association can be sanctioned under s.120. A non-cumulative dividend conferred by the memorandum was altered into a cumulative dividend as part of a scheme under s.120 (United States and South American Investment Trust Co. (00145 of 1913), Neville J. July 8, 1913)."

15. In my opinion both the aforesaid judgments has no direct relevance to the issue which I am considering in the present case. Firstly both the aforesaid judgments were in respect of alteration of Memorandum of Association and the issue before the

court was whether a special procedure prescribed under the Act is required to be seperately complied with or not, while considering the amalgamation of the two companies. The issue was that at the time of amalgamation of the two companies if the resolutions are passed merging the two companies then whether a seperate special resolution is required for the purpose of alteration of Memorandum of Association. In both the cases court has held that if a particular actions requires a special procedure to be fulfilled then in that even the same should be so done.

16. The learned counsel has thereafter relied upon the judgement of the Gujarat High Court in the case **In re Maneckchowk and Ahmedabad Manufacturing Co. Ltd reported in (1970) Vo.40 C.C. page 819** This judgement pertains to reduction in the share capital and subsequently the application of section 100 and 101 of the said Act. While considering the aspect of reduction in the share capital he learned single Judge D.A. Desai, J. (as he then was) has held that reduction in the share capital requires a special provision to be complied with if it involves

repayment of a part of paid up capital or extinguish ment or reduction of the liability or any of the shares in respect of unpaid share capital it would adversely affect the interest of the creditors. While considering and analysing section 100 and 101 read with Rule 85 of the Company Court Rules the court has come to the conclusion that the sole and main object of the provisions of sub-section (2) of section 101 is to protect the interest of the creditors. The court in the following paragraph has held as under :

> ." Rule 85 which I have already referred to earlier, provides that when reduction of share capital is to be effected as part of a scheme of compromise and arrangement, procedure prescribed for the same in the companies Act and Rules should be carried out as stated earlier. This provision is made for very good reasons. It unmistakably indicates that re-organization of share capital can be brought about as part of the scheme of compromise and arrangement. But even if it is to be done as part of the scheme of compromise and arrangement this special provision in rule 85 enjoins a duty to carry out the the procedure contained in section 1100 onwards of the Companies Act. Ordinarily, reduction of share capital affects members of the company and it can be brought about by a compromise or arrangement between the company and its members ignoring the creditors. Now, if reduction of share capital involves repayment of a part of paid up capital or extinguish or

reduce the liability on any of the shares in respect of unpaid share capital it would adversely affect the creditors. yet the creditors would have no voice in the matter. If the procedure as provided in section 100 onwards has got to be carried out the court could not sanction reduction of share capital unless the creditors are heard and provision is made for the creditors who object to the reduction. However, if the reduction of share capital does not involved either diminution of liability in respect of unpaid share capital or payment to any shareholder of any paid-up capital, the court can sanction the same without reference to the creditors. The creditors in such a case would not even be entitled to object to the proposed reduction as provided in section 102. In the instant case, admittedly, the reduction of share capital is by way o cancellation of share capital which is lost or is unrepresented by available assets. In such a case, creditors, even in a reduction simpliciter, are not entitled to object and it makes no difference if reduction is brought about by following the procedure prescribed in section 100 onwards or by way of a scheme of compromise and arrangement. Thus, if it can be done in a given set of circumstances as part of a scheme of compromise and arrangement, it has been properly done in this case and while sanctioning the scheme *ipso facto* the reduction of share capital ought to be confirmed.

. It does not appear well settled that where the scheme of compromise and arrangement comprises within its ambit reduction of share capital, the procedure for reduction must be gone through but if it is shown that the procedure prescribed under section 100 onwards has been carried out simultaneously while submitting the scheme for approval of the creditors and members, the court can, while sanctioning the scheme, sanction reduction of share capital. The important thing to find

> out would be whether the procedure for reduction of share capital wherever it is mandatory has been strictly carried out and wherever it is directory has been substantially complied with.
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> . Before one can find out as to what exact procedure should be followed for effecting reduction in share capital in a given case, it must be found out how the company proposes to reduce the share capital. The share capital of a company can be reduced in three distinct ways as set out in section 100. The company for effecting reduction of share capital may extinguish or reduce the liability of any of its shares in respect of share capital not paid up, either with or without extinguishing or reducing liability on any of its shares cancel any paid up share capital which is lost, or is unrepresented by available assets; or with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company. The reduction of the share capital can be effected by a special resolution at a general meeting which must be sanctioned by the court. Section 101 provides that, if the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or payment to any shareholder of any paid up share capital, the provisions therein prescribes shall have effect, subject to the powers of the court having regard to the special circumstances in the case to direct that the provisions of sub-section (2) shall not apply as regards any class or classes of creditors.

17. The learned counsel has thereafter relied upon the judgment of the learned single judge in the case of **Vasant Investment Corporation Ltd vs. Official**

Liquidator, Colaba Land and Mill co.Ltd. reported in (1981) Vol.51 C.C. 18 and has drawn my attention that the judgment of the Gujarat High Court has been confirmed and approved by the learned single judge and while considering the provisions of section 100 and 102 of the said Act of 1956 a principle has been introduced of substantial compliance with the provisions of section 100, 101 and 102. The relevant portion of the said judgment reads as under :

> " In the present case also, the company proposes to carry on its business with the help of the surplus funds available. The company has already rep aid in full to all the shareholders the capital invested by them in the company. There is, therefore, no question of any reduction of the share capital of the company.
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> . Even assuming that the scheme involves a reduction of the share capital of the company, it is possible to say, on the facts of the present case, that the procedure prescribed under ss.100 to 102 of the companies Act for he reduction of share capital has been substantially complied with by the company before the filing of this petition (by the petitioners). In this connection, the petitioners have relied upon a decision of the Gujarat High Court in *Maneckchowk and Ahmedabad Manufacturing Co.Ltd., In re* reported in [1970] 40 Comp.Cas 819. In the course of his judgment in the above case, D.A. Desai, J. (as he then was) has held that s.391 of the Companies Act is a

> complete code. However, in view of r.85 of the Company rules, whenever a scheme of arrangement proposed under s.391 involves a reduction of share capital, the procedure prescribed under ss.100 to 102 of the Companies Act must b e complied with,. He wen on to hold that in a case where the rights of the creditors were not affected, where 21 days' notice had been given of the proposed scheme to the members of the company and where the scheme was approved at a meeting held for the purpose by more than three-fourths of the members present and voting, the provisions of the Companies Act pertaining to reduction of share capital were substantially complied with. In respect of s.'00 which requires a special resolution to be passed for the reduction of share capital, he further held that the notice calling the general meeting need not specify the resolution as a special resolution. He held that the provision under the Companies Act for such notice is merely a directory provision and not a mandatory provision. The court should, therefore ascertain in such cases whether ss.100 to 102 of the Companies Act are substantially complied with. In the above case, the rights of the creditors were not affected by the scheme. Hence, the provisions laid down in ss.100 to 102 for the protection of the creditors did not require any consideration."

18. The aforesaid judgments in my opinion does not answer the question directly which is posed before me i.e. whether under the provisions of section 100 to 101 the circumstances under which the court is empowered to issue direction for compliance of the

said provisions where the cases fall under the third category i.e. falling in "any other case"., This issue did not come up for direct interpretation in the above mentioned cases i.e. *In re Maneckchowk and Ahmedabad Manufacturing co.Ltd (supra) or in the case of Vasant Investment Corporation ltd. vs. Official Liquidator, Colaba Land and Mill Co.Ltd.(supra).* The learned counsel has also fairly drawn my attention to the judgment of this court in the case of *PMP Auto Industries Ltd reported in (1194) Vol.80 CC. 289.* The learned counsel pointed out that in the said judgment there is no discussion pertaining to interpretation of section 100 and section 101 of the Act. The issue before the court arose under the provisions of section 394 of the said Companies Act and the objections were raised by the company law board for integration and amalgamation of PMP Auto Industries Ltd with S.S. Miranda Ltd and S.S. Miranda Ltd with Morarjee Goculdas Spg. And Wvg. Co.Ltd. The objection raised was that when memorandum of association of the transferee company namely Morarjee Goculdas Spg. and Wvg. Co.Ltd did not provide in the object clause the business carried

out by the other two companies, i.e PMP Auto Industries and Morarjee SS.Miranda Ltd then by way of amalgamation the Memorandum of Association of the Company should be deemed to have been altered or whether a special resolution is required in that behalf as provided under the Companies Act. However while dealing with the aforesaid question the learned single judge of this court has made a passing observation that while sanctioning the scheme of amalgamation the court has power to dispense with any special procedure which is otherwise required for effectuation of the amalgamation of the two companies and if such procedure is required then the court has power to dispense with the same except the procedure provided for reduction of share capital. The relevant portion of the said judgment is reproduced as under :

> " Thus the position in law appears to be clear. Section 391 invests the court with powers to approve or sanction a scheme of amalgamation/arrangement which is for the benefit of the company. In doing so, if there are any other things which, for effectuation, require a special procedure to be followed-except reduction of capital-then the court has powers to sanction them while sanctioning the scheme itself. It would not

> not be necessary for the company to resort to other provisions of the Companies Act or to follow other procedures prescribed for brining about the changes requisite for effectively implementing the scheme which is sanctioned by the court. Not only is section 391 a complete code as held by the courts, but in my view, it is intended to be in the nature of a "single window clearance" system to ensure that the parties are not put to avoidable, unnecessary and cumbersome procedure of making repeated applications to the court for various other alterations or changes which might be needed effectively to implement the sanctioned scheme whose overall fairness and feasibility has been judged by the court under section 394 of the Act."

19. The learned counsel has thereafter relied upon the judgement of the another single judge of this court *in the case of Hindustan Dorr-Oliver Ltd.,In re* r*eported in (2002) Vol.40 SEBI & Corporate Laws Report, page 521.* The aforesaid judgement though considers the provision of section 102, however on facts of that case the issue I propose to consider did not arise. In that case in fact the reduction in the share capital was directly resulting in diminution of liability and thus the issue was whether the power should be exercised under sub-section (3) of Section 101 or not. In my opinion

the said issue do not directly or squarely arise in the present case as admittedly in the present case the reduction in the share capital neither results in diminution of liability nor payment to any shareholder of any paid-up share capital but falls in the third category "any other cases".

20. The learned counsel has thereafter relied upon the division bench judgement in the case of *S.E.B.I. vs. Sterlite Industries (India) Ltd reported (2003) Vol.13 C.C. page 273.* The said judgement once again is not directly relevant to the facts of the present case. However the learned counsel has relied upon the said judgment only to the limited extent of pointing out that the judgments of PMP Auto Industries Ltd, Maneckchowk and Ahmedabad Manufacturing Co. Ltd, Vasant Investment Corporation Ltd (supra) were considered by the division bench of this court and has in fact approved the ratio thereof.

21. In the present case, the issue in my opinion can be considered on a simple interpretaion of

sub-section 2 of section 101. For such an interpretation of the said sub-section (2) it is important to ascertain what was the intent of the legislature while providing for a particular procedure of sub-section (2) of section 101. This issue of interpretation of sections 100 to 104 of the Act in fact came up for consideration before the three judge bench of the apex court in the case of **Cosmosteels Private Ltd and Ors. vs. Jairam Das Gupta and Ors reported in (1978) 1 SCC page 215** and while considering the aforesaid sections the court has held that the main intention of the legislature provided the procedure of sub-section (2) of section 101 is to provide security to the creditors and protect the interest of the creditors. Even while considering the provisions of sub-section 3 of section 101 the court has come to the conclusion that what is required to be seen into is whether notice is given to the creditors or not and should be given if the company is unilaterally trying to act to the detriment of the creditors. The said para-11 of the judgement is reproduced as herein under :

" A very serious apprehension was voiced by Mr. De that if the court directs the company to purchase the shares of some of its members while granting relief against oppression, the company would part with its funds which would jeopardise the security of the creditors of the company and that if s such a direction for reduction of share capital can be given by the court behind the the back of the creditors, the creditors would be adversely affected and, therefore, it was contended that, even though while giving direction under Section 402 directing the Company to purchase the shares of its members, it is not obligatory upon the Court to give notice to the creditors, such notice ought to be given in the interests of the creditors. This apprehension is in our opinion unfounded. Even when the Court is moved to confirm the resolution for reduction of share capital under Sections 100 to 104, the Court may in its discretion dispense with the procedure prescribed in that group of sections 9vide section 101(3)]. Undoubtedly, the court would use the discretion only upon proof of special circumstances as contemplated by section 101(3), but when such discretion is used, the creditors would have no opportunity to object to the reduction. The opportunity to object would thus depend upon the Court exercising its discretion one way or the other. It may be noticed that until the company submits its resolution for reduction of share capital to the Court, the creditors have no say in the matter and therefore, the court is empowered to ascertain the wishes of the creditors by following the procedure prescribed in sections 101 to 104. The object behind prescribing this procedure requiring, save in special circumstances as contemplated in Section 101(3), the Court to give notice to the creditors is that the members of the Company may not unilaterally act to the detriment of the creditors behind their back. If such a procedure were not prescribed., the court might, unaware of all the facts, be persuaded

> by the members to confirm the resolution and that might cause serious prejudice to the creditors. But such a situation would not be likely to arise in a petition under sections 397 to 398. In such a petition the court would be better in a position to have all the relevant facts and circumstances before it and it be the court which would decide whether to direct purchase of shares of the members by the company. Before giving such a direction the court would certainly keep in view all the relevant facts and circumstances, including the interest of the creditors. Even if the petition is being disposed of on a compromise between the parties, yet the court, before sanctioning the compromise, would certainly satisfy itself that the direction proposed to be given by it pursuant to the consent terms, would not adversely affect or jeopardise the interest of the creditors. Therefore, it cannot be said that merely because section 402 does not envisage consent of the creditors before the court gives direction for reduction of share capital consequent upon purchase of shares of some of the members by the company, there is no safeguard for the creditors."

22. Another judgment which is directly relevant in my opinion is the judgment of the Chancery Division in the case of **Inre Meux's Brewery Company Limited** r**eported in (1919) Ch.D.page 28** where also while considering the identical provisions of section 49(1) of the English Companies Act the learned judge has given an opinion that the words "any other cases if the Court so directs" is directly concerned with the

interest of the creditors and any person who is not a creditor and thus not affected by such reduction in share capital cannot object to the same. The relevant portion of the said judgment reads as under :

> " Section 49(1) enacts: Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital"- which is not the case here- "and in any other case if the court so directs," the creditors shall be entitled under the provisions contained in this section to object to the reduction. It is argued ob behalf of the debenture stock holders that this is a case in which the court ought to exercise its discretion by directing that, notwithstanding the fact that no diminution of liability or repayment to shareholders is involved, the creditors should still have the right to come in and object to this reduction. This is from one point of view a very startling proposition. The court has made hundreds of similar orders from time to time and there appears to be no authority in the books and no record of any reported case, in which debenture holders have successfully or otherwise been permitted to oppose a reduction of capital which does not involve a reduction of capital which does not involve a reduction of unpaid share capital or a repayment of paid-up share capital to shareholders. I think it is quite clear from s.49 (1) that there is power in the court to permit a creditor to object to a reduction where no such diminution of assets is about to take place, but from the framing of the section, and after considering the observations of Lord

> Macnaghten in *Poole v. National Bank of China (1)* I think that I am at least right in saying that prima facie creditors are not supposed to be concerned in these questions of reduction of capital where no diminution of unpaid share capital or repayment to shareholders of paid-up capital is involved; in other words, if the court is to allow a secured creditor in particular to object to a reduction which does not involve such a diminution of assets as is referred to in s.49(1) it is at least incumbent on him to make out a strong case before such a direction would be given. Now if I understand it rightly, the argument which has been addressed to me on behalf of the respondents really comes to this that the company is proposing to wipe off a debit on capital account which must include a substantial sum of floating or circulating capital-in other words, the company is proposing to put itself in a position which will enable it to pay a dividend out of its annual profits without making good such portion of its lost capital as is properly attributable to floating or circulating capital, whatever may be the true meaning of that term".

23. The aforesaid two judgements establishes beyond doubt that the provisions of sub-section (2) of section 101 is enacted with an intention to protect the interest of the creditors. Thus I am required to consider the words "any other cases" appearing in sub-section (2) of section 101 by keeping in mind the purpose and intention of legislature as enunciated by these authorities.

24. In my opinion it is a settled principle of law that wherever a specific words in a section are followed by the general words then the interpretation of the general words must be restricted to the same class of category which are prescribed in the preceding part of the said general words. This principle of law known as ejusdem generis is well settled. The rule of ejusdem generis is applicable when any particular words pertaining to a class, category or genus are followed by general words in such cases. Then the general words are so construed as limited to things of same kinds as are specified in the preceding part of such section. The principle of ejusdem generis has been so expressed by Maxwell in its 12th edition as under :

> " But the general word which follows particular and specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same genus as those words. for according to a well established rule in the construction of statues, general terms following particuclar ones apply only to such persons or things as are ejusdem generis with those comprehended in the language of the Legislature." In other words, the general expression is to be read as comprehending only things of the same kind as

> that designated by the preceding particular expressions, unless there is something to show that a wider sense was intended, as where there is a provision specifically excepting certain classes clearly not within the suggested genus."

25. This principle of ejusdem generis is also accepted by the apex Court in the case of **Collector of Central Excise, Bombay v/s. Maharashtra Fur Fabrics Ltd reported in (2002) 7 SCC 444.** wherein the apex court has held as under :

> " A careful reading of the proviso to the notification would show that by resorting not only to the process of bleaching, dyeing, printing, shrink-proofing, tentering, heat-setting, crease resistant processing, but also to "any other process or any two or one of these processes", the respondent would lose the benefit of the exemption. It is a well established principle that general terms following particular expressions take their colour and meaning as that of the preceding expressions, applying the principle of ejusdem generis rule, therefore, in construing the words "or any other process:, the import of the specific expressions will have to be kept in mind. It follows that the words "or any other process" would have to be understood in the same sense in which the process, including tentering would be understood. Thus understood, a process akin to stentering/tentering would fall within the meaning of the proviso, and consequently, the benefit of notification cannot be availed by

the respondent."

26. The said judgment approves earlier veiw of the apex court in the case of *M/s. Siddeshwari Cotton Mills (P) Ltd v/s. Union of india and Another reported in (1989) 2 SCC 458* Thus applying the principle of ejusdem generis in the present case the word "any other case" which are general in nature must take its colour from the earlier part of the said sub-section (2) of section 101 which inter-alia provides for protecting all creditors either in the case of diminution of liability or the payment to any shareholder of paid-up share capital. thus the word "any other case" must be so read that this will cover all such categories in the interest of the creditor is vitally affected by any process of reduction of share capital and only in that event the court is empowered to direct the company to follow the procedure provided for under sub-section (2) of section 101 of the said Act.

27. The aforesaid view which I am inclined to take is also supported by the judgment of Madras High court in the case of **Asian Investments Ltd and Ors In re. reported in (1992) Vol.73, C.C. page 517** wherein while considering the provisions of section 100, 101 and 102 of the Companies Act the court has held as under :

> " further rule 85 of the Companies (Court) rule,1 959 which is part of the scheme of section 101 and section 102 of the Act, provides that where a proposed compromise or arrangement involves reduction of capital by the company, the procedure prescribed by the Act and the rules relating to reduction of capital shall be complied with before teh compromise or arrangement as far as it relates to reduction of capital is concerned. It isd therefore evident that section 101 and section 102 and reule 85 would stand attracted only to cases of compromise or arrangement involving reduction of capital and not to cases of amalgamaion simpliciter when the entirety of the assets and liabilities are transferred and when there is no release of any assets."
>
> . The object of asking for confirmation by the court of reduction of capital is to safeguard the interest of the creditors of the company. In the instant case, the resolution approving the scheme of amalgamation was unanimous. There was no voice of protest from any quarter. The scheme is a comprehensive and consolidated scheme. It is a peculiar case of amalgamation where a holding company is amalgamated with a subsidiary company. Therefore, I am clear in mind that the

> contention raised by Mr. Venkathalamoorty is not well-founded. As already mentioned this case on hand is not a case where there is reduction in capital. Further the procedure prescribed under sections 101 and 102 read with rule 85 do not stand attracted to a case of scheme of amalgamation, where there is no release of assets but which involves transfer of all assets and liabilities."

28. In view of the aforesaid discussion I am of the view that in the present case since, there is no diminution of liability or payment to any shareholder of any paid up share capital and that the reduction of share Capital is only for set off accumalted losses against the Capital Redemption Reserve Account and Share Premium Account thus the interest of the creditor is not likely to be affected and therefore it is not necessary to comply the procedure prescribed under section 101(2) of the Companies Act-I of 1956.

29. Thus in my opinion on a true and correct interpretation of sub-section (2) of section 101 of the Act the question of dispensing with the requirements by following the procedure provided therein for reduction in share capital in cases which

do not fall in the category of one and two does not arise. It is only when the court finds that by any other method the company seeks to affect the interest of the creditors that the court is empowered to issue direction to follow the procedure under sub-section (2). The question of dispensation in the present case arises only under sub-section (3) of section 101 where the reduction of the share capital is by the method provided in category 1 and 2 of sub-section (2) of section 101. At present the practice followed on the original side of this court is to apply for dispensing with the procedure prescribed under sub-section (2) of section 101 even in cases where it does not fall in either of the first two categories and thus provisions of sub-section (3) does not apply. In my opinion the said procedure is required to be discontinued. However it is necessary that the company while making an application for confirmation of reduction of share capital under sections 100 to 101 either independently or alongwith amalgamation petition under section 391 to 394 of the Companies Act the company must aver in the petition that whether a reduction in the share capital proposed is

likely to affect in any manner the interest of the creditors or not. This would enable the court to ascertain whether the power under sub-section (2) for giving specific directions under the third categories of the cases should be exercised or not. The office of the Company Registrar is thus directed to ensure that such necessary averments are made in the petition wherever the cases involve a reduction in share capital.

30. In light of the above observation the application is made absolute in terms of prayer clause (a) with the aforesaid directions contained in a preceding paragraph.

sd/-

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